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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

HARRY WILLIAM BROWN, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

INTRODUCTION

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the Supreme Court of Virginia entered in the above-entitled case on the 18th day of October, 1974, petition for rehearing denied on December 5, 1974.

Harry William Brown, Petitioner, was the Defendant in the Trial Court, and hereinafter will either be referred to as "Brown" or "Defendant". The Respondent, the Commonwealth of Virginia, will hereinafter be referred to as "Commonwealth". All references to the Transcript will be designated (Tr. ____). All references to the Transcript of the Motion to Set Aside the Verdict will be designated (Tr. Motion to Set Aside Verdict ____).

OPINION BELOW

The order of the Court below, without opinion, was dated December 5, 1974, and stated as follows:

> "On mature consideration of the Petition of the Plaintiff in error to set aside the judgment rendered herein (Case A - Indictment No. 173-17, 315) on the 18th day of October, 1974, and grant a rehearing thereof, the prayer of the said Petitioner is denied."

JURISDICTION

The Final Order of the Supreme Court of Virginia was made and entered on the 5th day of December, 1974. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3).

QUESTION PRESENTED

Where evidence was produced which showed that an exhibit, in the exclusive possession of the Commonwealth during the trial, had been materially altered and changed, did the Supreme Court of Virginia violate the Defendant's right of Due Process in denying a Writ of Error to review the refusal of the Lower Court to rule on said alteration?

STATEMENT OF THE CASE

The Defendant was tried before a jury in a two-day trial on January 30-31, 1974, upon two charges (hereinafter referred to as Case A and Case B) alleging that he did unlawfully and feloniously distribute a controlled substance, to-wit: a quantity of heroin, a Schedule I

controlled substance, in violation of *Code of Virginia* (1950), §54-524.101:1(a), on July 3, 1973 and July 26, 1973, in the City of Martinsville, Virginia. The charge which allegedly occurred on July 3, 1973, and which is the subject of this Petition, will hereinafter be referred to as Case A; the charge which allegedly occurred on July 26, 1973, will hereinafter be referred to as Case B.

The main witness for the Commonwealth, George Lincoln Hopkins, Jr. (hereinafter referred to as "Hopkins"), testified that on July 2, 1973, he rented a motel room in Henry County, Virginia, for the purpose of selling various drugs from that location. According to Hopkins' testimony he contacted the Defendant in order to obtain additional heroin, which was to be sold by Hopkins and a portion of the proceeds to be returned to the Defendant (Tr. 6). The heroin was allegedly actually delivered to Hopkins by the Defendant on the afternoon of July 3, 1973 (Tr. 6). Early in the morning of July 4, 1973, officers from the Henry County Sheriff's Office and the Martinsville Police Department raided the motel and later discovered 29 foil packets containing a white substance, later proven to be heroin (Tr. 50-54). The foil wrapped packages of heroin were sent to the Division of Consolidated Laboratory Services for possible fingerprint identification (Tr. 49). It was found there that several prints on the foil were identifiable as those of the Defendant. (Tr. 65, 78).

When the Defendant took the stand, he, in an effort to explain the presence of his fingerprints, testified that Hopkins had come to his house on June 29, 1973, to try to sell him a pistol. On that occasion the pistol had been wrapped in tin foil and the Defendant had touched the tin foil on the pistol (Tr. 151-52, 185-86). During the

trial, the Attorney for the Commonwealth handed a pistol to the Defendant and a box of tin foil and asked the Defendant to wrap the weapon as the one had been wrapped when Hopkins had handed it to him (Tr. 195-98). The Defendant loosely wrapped tin foil around the gun (Tr. of Motion to Set Aside the Verdict, pp. 15, 21-26, 30-34, 38-40).

The Commonwealth's Attorney then made extensive references in his rebuttal to the fact that foil in such a wrinkled condition could not have been used to package the heroin, and even if it could have been flattened out, latent fingerprints could not remain thereon. (Tr. of Motion to Set Aside Verdict, p. 17).

After the jury returned a verdict of guilty on both Case A and Case B and fixed his punishment at a five year sentence and a $2,500.00 fine on each case (Tr. 240), and Final Judgment Order was entered against the Defendant on the 31st day of January, 1974, it came to the attention of counsel for the Defendant that sometime between the cross-examination of the Defendant and the rebuttal to the Defendant's closing argument, the pistol and foil had been altered, in that the foil was then tightly compressed and wrinkled against the outline of the pistol (Tr. of Motion to Set Aside Verdict, pp. 23-26, 31-32, 34, 39-40, 45), which had the effect of enhancing the argument of the Commonwealth's Attorney.

Upon discovery of the alteration of said exhibit, counsel for the Defendant, on February 21, 1974, moved to set aside the verdict on the ground that such a material alteration of an exhibit in the exclusive possession of the Commonwealth would be a violation of the Defendant's right to a fair trial and, therefore, violative of due process of law (Tr. of Motion to Set Aside Verdict, pp. 3-4).

In support of said motion, counsel for the Defendant produced testimony by several witnesses, to the effect that the condition of the gun and tin foil had changed drastically between the time of the cross-examination of the Defendant and the rebuttal argument of the Commonwealth's Attorney, while the exhibits had been in the exclusive possession of the Commonwealth.

Said motion was overruled by the Trial Court without deciding whether, in fact, the exhibited articles were altered while in the exclusive possession of the Commonwealth. The Trial Court stated: ". . . this is something that took place during the trial, whether it was altered or not, I'm not going to get into that part." (Tr. 53). Therefore, despite testimony by competent observers, the Trial Court failed even to rule on the issue in question.

REASONS FOR GRANTING THE WRIT

The failure of the Trial Court to decide whether or not the exhibit had in fact been altered, as the witnesses in the hearing on the Motion to Set Aside the Verdict testified, was an abuse of discretion and a clear violation of the Defendant's right to a fair trial, as guaranteed by the *Due Process Clause* of the *Fourteenth Amendment* to the *United States Constitution.* If the exhibit had been altered or changed from its original condition, then it is respectfully submitted that such would constitute a violation of the Defendant's rights to a fair trial. It is further submitted that the refusal by the Supreme Court of Virginia to rule on said refusal, would also be a violation of the Defendant's rights.

Although there was ample testimony by competent witnesses that the condition of the foil had changed

drastically while in the possession of the Commonwealth, it is not the purpose of this Petition to assert that such was the case. Rather, the failure of the Trial Court even to decide whether or not the exhibit was actually altered or changed is the point in issue herein. Clearly, the decision of the Trial Court and the Supreme Court of Virginia should have been based on whether, in fact, the exhibited articles were altered while in the exclusive possession of the Commonwealth. If the Trial Court had then found that the exhibits had not been altered, then it is admitted that there would have been no basis for sustaining the Motion to Set Aside the Verdict. However, if the Trial Court had found that there had in fact been a material alteration, whether intentional or not, then certainly the Defendant's rights under the *Fourteenth Amendment* of the *United States Constitution* would have been violated and a new trial should have been granted. Despite the fact that evidence was produced at the hearing on the Motion to Set Aside the Verdict that someone, who had access to the gun and tin foil which were in the exclusive possession of the Commonwealth, had materially changed the condition of the articles, the trial court refused to rule thereon. The failure of the Supreme Court to review the lower Court's decision was an abuse of discretion and a clear violation of the Defendant's guaranteed right to a fair trial.

It is clear that the prosecution's knowing use of false evidence violates a criminal defendant's rights under the *Fourteenth Amendment* to the *United States Constitution*. The leading case in this regard is *Miller* v. *Pate*, 386 U. S. 1 (1967). In *Miller*, the prosecution had introduced into evidence in the prosecution of a brutal sexual assault-murder of an eight year old girl, a pair of undershorts which were purportedly stained with blood of the same

type as the victim, a different type from that of the defendant. The shorts formed a crucial part of the prosecution's case. When the shorts were later examined by an expert at a post-conviction hearing, it was revealed that the stains were paint and not blood. The prosecution conceded this, but attempted to point out that the shorts were introduced into evidence for the jury to examine and that the nature of the stains could be determined by observation. However, the expert who discovered the paint stains indicated that the nature of the stains would be almost impossible to ascertain without chemical analysis. The Court stated at page 7:

> "More than 30 years ago this Court held that the *Fourteenth Amendment* cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney* v. *Holohan,* 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791. There has been no deviation from that established principle. *Napue* v. *People of State of Illinois,* 360 U. S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217; *Pyle* v. *State of Kansas,* 317 U. S. 213, 63 S.Ct. 177, 87 L.Ed. 214; *Cf., Alcorta* v. *State of Texas,* 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9. There can be no retreat from that principle here."

An analagous situation arises in the knowing use of false testimony by a witness. In *Rhinehart* v. *Rhay,* 440 F. 2d 718, 723 (1971), the following quote appears:

> "It is clear that the state may not use the false testimony of a witness where the prosecutor or other representative of the state knows the testimony to be false. This principle applies equally where the testimony is unsolicited by the state but allowed to go uncorrected. It makes no dif-

> ference whether the false testimony goes to substantive aspects of the offense, the credibility of the witness, or the ultimate punishment of the accused. Finally, the defense need not show that the true state of the facts would necessarily have resulted in an acquittal since '(t)he false testimony used by the state in securing the conviction * * * may have had an effect on the outcome of the trial.' "

While it must be conceded that there was no proof offered by the defense that the alteration of the exhibits was done knowingly by the Commonwealth, the mere use of said objects against the Defendant would be a violation of due process of law. During the entire course of the trial, the articles were in the exclusive possession of the Commonwealth. Whether the change was done knowingly or unwillingly is immaterial, because the prosecution owed to the Defendant the right to have exhibits shown to the jury unchanged.

Here, the Trial Court did not even see fit to decide whether or not the exhibit had in fact been altered. Failure of the Trial Court to decide whether an alteration had occurred, after evidence had been presented to that effect, and failure of the Supreme Court of Virginia to review said decision represent a breach in the right of the Defendant to a fair and impartial trial, as guaranteed by the *Fourteenth Amendment* to the *United States Constitution.*

The duty of this Court to make its own independent examination of the record when Federal Constitutional deprivations are alleged is clear, resting as it does on its solemn responsibility for maintaining the Constitution

inviolate. *Martin* v. *Hunter's Lessee,* I Wheat. 304, 4 L.Ed. 97; *Cooper* v. *Aaron,* 358 U.S. 1, 78 S. Ct. 1401, 3 L.Ed 2d 5. This Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

HARRY WILLIAM BROWN

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CERTIFICATE

I, R. Reid Young, Jr., of Young, Kiser, Haskins & Mann, Ltd., 60 West Church Street, Martinsville, Virginia, 24112, do hereby certify that on or before the day this Petitioner's Brief was filed with the Clerk of the Supreme Court of the United States, I mailed three (3) copies of the said Brief to Andrew P. Miller, Attorney General of the Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219, and John J. Hartley, Commonwealth's Attorney for the City of Martinsville, 2-1/2 East Main Street, Martinsville, Virginia, 24112, counsel of record for the Respondent.

R. REID YOUNG, JR.
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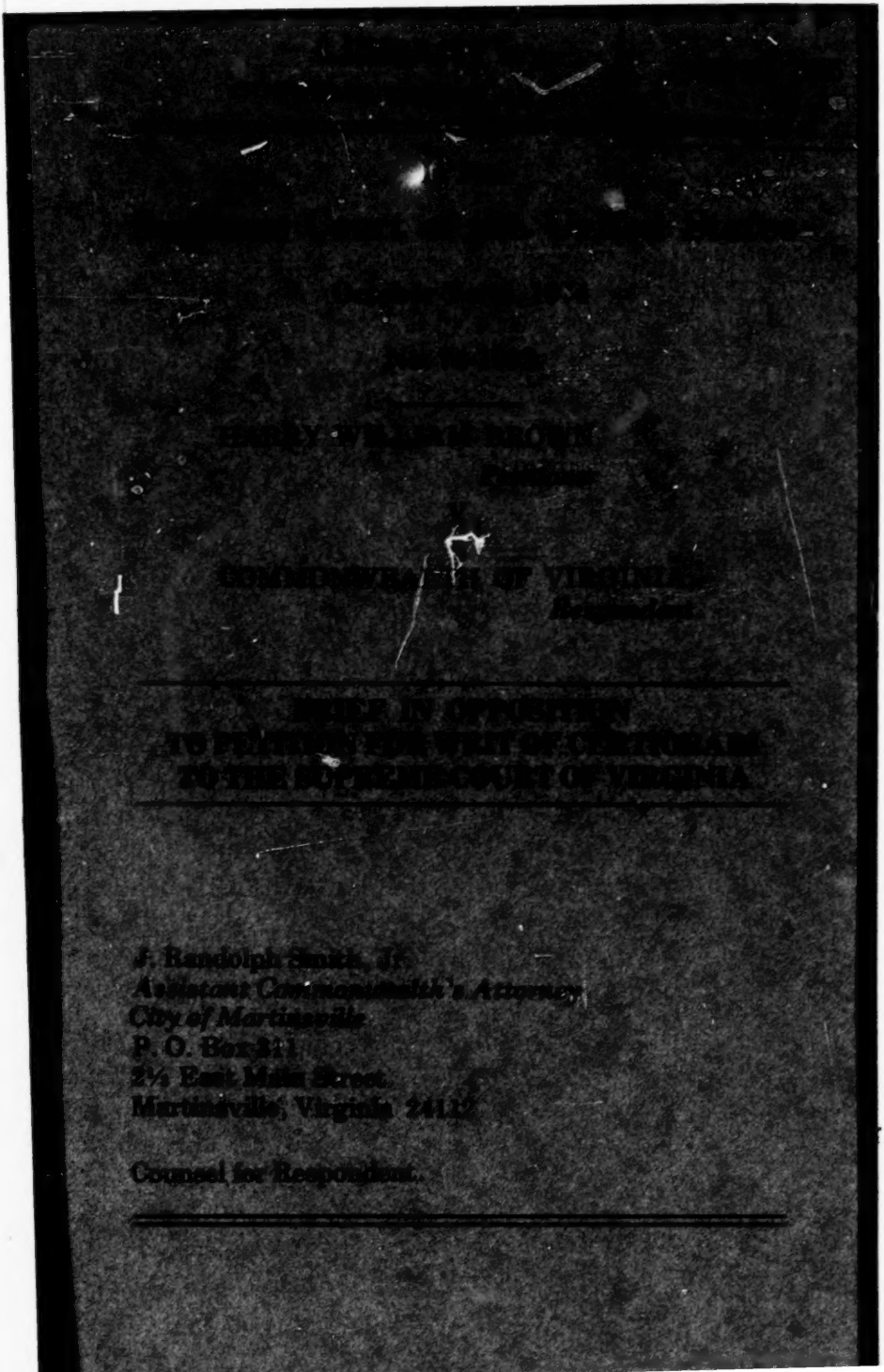

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In The

Supreme Court of the United States

October Term, 1974

No. 74-1092

HARRY WILLIAM BROWN,
Petitioner,
VS:
COMMONWEALTH OF VIRGINIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

INTRODUCTION

The Respondent prays that this Honorable Court, in the exercise of its sound judicial discretion, deny the Writ of Certiorari requested by the Petitioner in the above styled case.

OPINION BELOW

The judgment order of the Supreme Court of Virginia refusing a Writ of Error and Supersedeas as to this case, entered on October 18, 1974, is not reported. The portion of that order pertaining to this case reads as follows:

"The petition for a writ of error and supersedeas to the aforesaid judgment rendered by the court below on the 31st day of January, 1974, in Case A - Indictment No. 173-17,315, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of the opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the said judgment insofar as it pertains to Case A - Indictment No. 173-17,315."

The judgment order of the Supreme Court of Virginia refusing to grant a rehearing as to its denial of a writ of error in the case is not reported. That order is set forth on page 2 of the Petition for Writ of Certiorari filed by the Petitioner.

JURISDICTION

Jurisdiction for this Court to entertain the Petition has been asserted under 28 U.S.C. § 1257 (3) and Rule 22 (1) of the Supreme Court of the United States Revised Rules (1970) in order to obtain review by a writ of certiorari of the final judgment of the Supreme Court of Virginia entered in this case on December 5, 1974. The Petition was filed on March 3, 1975.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first paragraph of the Fourteenth Amendment to the United States Constitution reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 5:7 of the Rules of the Supreme Court of Virginia (1972), Title 8, Code of Virginia (1950), Suppl. to 1957 Repl. Vol. 2, reads as follows:

> "This Court will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the notice of appeal and assignments of error will be noticed by this Court and error not so assigned will not be admitted as a ground of a reversal of a decision below."

QUESTION PRESENTED

Where in a post-trial proceeding spectators at the trial testified that a piece of wrinkled foil produced by a courtroom demonstration, which had been in the possession of the prosecutor and a police officer during

a luncheon recess, appeared to have become changed in appearance between the time of the demonstration and the time of the foil's display to the jury during the prosecutor's rebuttal closing argument, was the Petitioner's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution violated by the trial court denying the Petitioner's motion for a new trial without making a factual determination as to whether or not the foil had been changed in appearance?

STATEMENT OF THE CASE

The following is deemed necessary to supplement the Statement of the Case contained in the Petition for Writ of Certiorari filed by the Petitioner:

After the Petitioner Brown had testified that Hopkins, the chief prosecution witness, had handed him a gun wrapped in tin foil, which Brown had unwrapped and examined, the prosecutor, during his cross examination, presented Brown with a gun and a box of tin foil and asked Brown to demonstrate what had occurred. (Tr. 194-197). Brown was handed a snub nose .38 calibre revolver, which he admitted was similar to the gun shown him by Hopkins. (Tr. 195 and Tr. of Motion to Set Aside Verdict, p. 9). Brown was then handed a box of tin foil and asked to tear off a sheet of the approximate size of the one in which the Hopkins gun was wrapped and to wrap the gun in the manner that the Hopkins gun was wrapped. (Tr. 196 and Tr. of Motion to Set Aside Verdict, pp.9-10). Brown wrapped

the gun and held it in the palm of his hand. (Tr. 196). Brown then demonstrated what he had done when Hopkins had handed him the gun on June 29. Brown unwrapped the gun, rewrapped it, then unwrapped it again and rewrapped it again as he testified to what conversation was transpiring between Hopkins and him when the event had occurred at Brown's house. (Tr. 197 and Tr. of Motion to Set Aside Verdict, p. 10).

The foil wrapped gun was then placed on the counsel table used by the prosecutor, in plain view of the court, jury, defendant, and defense counsel, where it remained during the remainder of the morning session of the trial. (Tr. of Motion to Set Aside Verdict, pp. 6-7; 11). At the conclusion of the morning session a view was requested by the defense counsel. (Tr. 227). The court was then recessed for lunch. (Tr. 227-230).

When the court recessed for lunch the prosecutor placed the foil wrapped gun in a paper bag and handed it to Det. Sgt. Fred D. Nester of the Martinsville Police Department with instructions to keep it under lock and key during the recess. (Tr. of Motion to Set Aside Verdict, pp. 7, 11, 18). Det. Sgt. Nester locked the bag in his office in a locked filing cabinet to which only he and Det. I. E. Asburry, Jr., had keys. (Tr. of Motion to Set Aside Verdict, pp. 18-19). Det. Sgt. Nester and Det. Asburry lunched together, after which Det. Sgt. Nester retrieved the bag from the cabinet and returned it to the prosecutor shortly before the court reconvened for the afternoon session. (Tr. of Motion to Set Aside Verdict, pp. 8, 11, 19). The bag was placed on the prosecution's counsel table where it remained during the afternoon session until the Commonwealth's

rebuttal closing argument. (Tr. of Motion to Set Aside Verdict, p. 8). Both the prosecutor and Det. Sgt. Nester denied handling or tampering with the foil wrapped gun in any manner during the trial. (Tr. of Motion to Set Aside Verdict, pp. 12-13, 20-21). The foil wrapped gun was never introduced into evidence. (Tr. of Motion to Set Aside Verdict, p. 51).

During the rebuttal closing argument of the Commonwealth the prosecutor unwrapped the gun before the jury and used the wrinkled foil which was the result of the demonstration to point up the unlikelihood of such foil being reused to package heroin and of foil so used to retain fingerprints which would be identifiable. (Tr. of Motion to Set Aside Verdict, pp. 15-17, 32-33). No objections were made during the trial to the demonstration or the rebuttal argument.

Twenty-one days after the conclusion of the trial a motion for a new trial was made on the ground that the condition of the foil used to wrap the gun had been materially altered between the completion of the demonstration and the presentation of the result of the demonstration during the rebuttal closing argument. (Tr. of Motion to Set Aside Verdict, pp. 1-4). At the hearing held February 21, 1974, on the motion the only evidence of any changed condition consisted of opinion testimony of Brown and three courtroom spectators who had been seated some distance back in the gallery. (Tr. of Motion to Set Aside Verdict. pp. 23-26, 30-37, 38-43, 44-46). The trial court, after hearing the evidence, overruled the motion for a new trial and stated, "Everything that has been testified to here

today was observed by the Jury. Everything that these witnesses have seen the Jury was in closer proximity of [*sic*] the evidence, they could have seen it, they could have considered it. They were the people who had to make the decisions in this proceeding and if as many people as testified in this proceeding observed that, then I see no reason why the Jury could not have observed it, too. Whether they considered it or not I don't know, but I feel that this Court would be invading the province of the Jury if it went into it. Secondly, this is something that took place during the trial, whether it was altered or not, I'm not going to get into that part. But no objection was made on behalf of the defendant.*** Now, no objection was made at that particular point and I feel that the Jury was in a better position to observe each of the movements and arguments than spectators in the Courtroom." (Tr. of Motion to Set Aside Verdict, pp. 52-54).

The trial court's refusal to hold that the foil had or had not been changed in condition during the trial was never specifically objected to on the ground that such refusal to rule was a violation of the Petitioner's due process rights, nor was the trial court's failure to make a factual determination as to whether or not the foil had been changed in condition during the trial assigned as error in the Notice of Appeal and Assignments of Error. (See Appendix to this brief).

ARGUMENT

I. The Petition for a Writ of Certiorari should be denied because the failure of the trial court to find whether or not a foil used in a demonstration before the jury had become changed in appearance during the trial could not have denied the Petitioner due process of law since even if the foil had become changed in appearance there was no evidence that any alteration was made by or with the knowledge of the prosecution.

It is now an established precept of the law that the prosecution's knowing and intentional use of false evidence against a criminal defendant constitutes a violation of the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. *Miller v. Pate*, 386 U.S. 1, 6-7, 87 S. Ct. 785, 787-788, 17 L. Ed. 2d 690 (1967); *Hamric v. Bailey*, 386 F. 2d 390, 394-395 (4th Cir. 1967); cf. *Shuler v. Wainwright*, 491 F. 2d 1213, 1216-1217 (5th Cir. 1974); *Soulia v. O'Brien*, 188 F. 2d 233, 233-234 (1st Cir. 1951), cert. den. 341 U.S. 928, 71 S.Ct. 794, 95 L. Ed. 1359 (1951), reh. den. 341 U.S. 957, 71 S.Ct. 1006, 95 L. Ed. 1378 (1951); *Howington v. Waters*, 199 F. 2d 87, 88 (10th Cir. 1952).

However, the mere use of false evidence by the prosecution does not, standing alone, constitute a violation of due process of law under either the Fifth Amendment or the Fourteenth Amendment. It has been clearly established that a criminal defendant seeking to void his conviction on the ground that false

evidence or perjured testimony was used against him at his trial has to prove not only that the evidence was false or the testimony perjured, but also that it was knowingly and intentionally used by the prosecution with knowledge of its falsity. See e.g. *Tilghman v. Hunter*, 167 F. 2d 661, 662 (10th Cir. 1948); *Cobb v. Hunter*, 167 F. 2d 888, 889 (10th Cir. 1948), cert den. 335 U.S. 832, 69 S.Ct.19, 93 L. Ed. 385 (1948); *Ryles v. United States*, 198 F. 2d 199, 200 (10th Cir. 1952); *United States v. Spadafora*, 200 F. 2d 140, 142 (7th Cir. 1952); *United States v. Rutkin*, 212 F. 2d 641, 643 (3rd Cir. 1954); *Taylor v. United States*, 221 F. 2d 228 (9th Cir. 1955); *Taylor v. United States*, 229 F. 2d 826, 832 (8th Cir. 1956), cert. den. 351 U.S. 986, 76 S.Ct. 1055, 100 L. Ed. 1500 (1956); *Lister v. McLeod*, 240 F. 2d 16, 17 (10th Cir. 1957); *Sears v. United States*, 265 F. 2d 301, 302 (5th Cir. 1959); *Polson v. Government of the Canal Zone*, 265 F. 2d 638 (5th Cir. 1959); *United States ex rel. Helwig v. Maroney*, 271 F. 2d 329, 332 (3rd Cir. 1959), cert. den. 362 U.S. 954, 80 S.Ct. 870, 4 L. Ed. 2d 872, (1960), reh. den. 362 U.S. 992, 80 S.Ct. 1080, 4 L. Ed. 2d 1024 (1960); *Enzor v. United States*. 296 F. 2d 62, 63 (5th Cir. 1961), cert. den. 369 U.S. 854, 82 S.Ct. 940, 8 L. Ed. 2d 12 (1962); *Holt v. United States*, 303 F. 2d 791, 794 (8th Cir. 1962), cert. den. 372 U.S. 970, 83 S.Ct. 1095, 10 L. Ed. 2d 132 (1963); *Green v. United States*, 313 F. 2d 6, 8 (1st Cir. 1963), cert. dismissed 372 U.S. 951, 83 S.Ct. 948, 9 L. Ed. 2d 976 (1963); *Marcella v. United States*, 344 F. 2d 876, 880 (9th Cir. 1965), cert. den. 382 U.S. 1016, 86 S.Ct. 630, 15 L. Ed. 2d 531 (1966); *Anderson v. United States*, 403 F. 2d 451, 454 (7th Cir. 1968), cert. den. 393 U.S. 903, 89 S.Ct. 1009, 22 L. Ed. 2d 215 (1969); *United*

States ex rel. Catanzaro v. Mancusi, 404 F. 2d 296, 300 (2d Cir. 1968), cert. den. 397 U.S. 942, 90 S.Ct. 956, 25 L. Ed. 2d 123 (1970), reh. den. 398 U.S. 915, 90 S.Ct. 1699, 26 L. Ed. 2d 80 (1970); cf. *Campbell v. United States*, 429 F. 2d 209, 211 (D.C. Cir. 1970).

This Court itself in *Hysler v. Florida*, 315 U.S. 411, 62 S.Ct. 688, 86 L. Ed. 932 (1942), in reviewing a state murder conviction in light of the due process clause of the Fourteenth Amendment, held that the mere recantation of a prosecution witness was insufficient to require a new trial to be granted in the absence of a showing that the witness's trial testimony was perjured and was knowingly and intentionally used by the prosecution. 315 U.S. at 413; 62 S.Ct. at 690.

The requirement that any use of false evidence or perjured testimony be done knowingly and intentionally by the prosecution in order to find a denial of due process of law under the Fourteenth Amendment would appear mandated by the requirement of "state action" embraced in the Fourteenth Amendment. This is emphasized by the manner in which the law on the use of false evidence was established by this Court in the case of *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406 (1935), reh. den. 294 U.S. 732, 55 S.Ct. 511, 79 L.Ed. 1261 (1935).

In Mooney it was clear that perjured testimony had been used to obtain the conviction and that the testimony had been intentionally used by the prosecutor with full knowledge that it was perjured. In this Court the argument was advanced that there was no violation of the Fourteenth Amendment because the actions of the prosecutor did not constitute "state action". This Court rejected the argument, found that the prosecutor's action was "state action" under the Fourteenth Amendment, and held that Mooney's rights to due process of law had been violated. 294 U.S. at 112-113; 55 S.Ct. at 342. Consequently, since it is the action of the prosecutor in knowingly and intentionally utilizing false evidence or perjured testimony which results in the "state action" required, the absence of any knowledge of or participation in the submission of false evidence by the prosecutor (or police) negates any "state action" and renders the Fourteenth Amendment inapplicable.

In this case there was no evidence that the prosecution intentionally altered the foil wrapped gun during the trial or had any knowledge of any alteration which may have occurred. The two persons having custody of the gun during the trial specifically denied any tampering with or alteration of the foil. Thus even if the trial court had found as a fact that the foil was in a changed condition at the time of the rebuttal closing from what it had been in at the conclusion of the demonstration, the court could still not have held that the Petitioner's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution had been violated by the prosecution showing the foil to the jury during the rebuttal closing

argument. The trial court's refusal to make a factual finding at the post-trial hearing could not have denied the Petitioner due process of law under the circumstances.

II. The Petition for a Writ of Certiorari should be denied because an independent examination of the record reveals no denial of due process of law.

This Court has frequently held that the finding of facts from disputed evidence is a matter for the lower courts, although this Court may make its own independent examination of the record to confirm that the facts found are supported by the evidence. *Watts v. Indiana*, 338 U.S. 49, 50-52, 69 S.Ct. 1347, 1348 - 1349, 93 L. Ed. 1801 (1949); *Wolfe v. North Carolina*, 364 U.S. 177, 196, 80 S.Ct. 1482, 1492, 4 L. Ed. 2d 1650 (1960), reh. den. 364 U.S. 856, 81 S.Ct. 29, 5 L. Ed. 2d 80 (1960). Constitutional adjudications are then predicated on the facts as found by the state courts and on undisputed facts. *Pennekamp v. Florida*, 328 U.S. 331, 345-346, 66 S.Ct. 1029, 1036-1037, 90 L. Ed. 1295 (1946). Even where the constitutional claim is that the prosecution knowingly used perjured testimony, the question of whether the testimony was in fact perjured is a factual appraisal to be made by the courts below. *Lisenba v. California*, 314 U.S. 219, 226-227, 62 S.Ct. 280, 285-286, 86 L. Ed. 166 (1941), reh. den. 315 U.S. 826, 62 S.Ct. 620, 86 L. Ed. 1222 (1942); *United States v. Johnson*, 327 U.S. 106, 113, 66 S.Ct. 464, 467, 90 L. Ed. 562 (1946), reh. den. 327 U.S. 817, 66 S.Ct. 699, 90 L. Ed. 1040 (1946).

However, where a state trial court makes no finding of facts and the judgment is upheld by the state supreme court without opinion, this Court has held that the state court judgment must be upheld if there is sufficient evidence to sustain it even though contradictory evidence exists. *Gleason v. White,* 199 U.S. 54, 60, 25 S.Ct. 782, 783, 50 L. Ed. 87 (1905). Consequently, in making an independent examination of the record to ascertain if there has been a denial of due process of law, if there was sufficient evidence presented to support the trial court's denial of the motion for a new trial, that decision should be upheld.

In examining the evidence presented at the post-trial hearing it should be noted that the burden is upon a person asserting a denial of due process of law to show it as a "demonstrable reality". *Buchalter v. New York,* 319 U.S. 427, 431, 63 S.Ct. 1129, 1132, 87 L. Ed. 1492 (1943). The evidence in this case falls far short of such proof.

The comparison of this case with the case of *Miller v. Pate,* 386 U.S. 1, 87 S.Ct. 785, 17 L. Ed. 2d 690 (1967), relied on by the Petitioner, is striking. In Miller a "vital component" of the case against the defendant was a pair of men's undershorts which were supposedly stained with dried blood of the victim's type. The shorts were introduced into evidence, an expert testified for the prosecution that the shorts were stained with blood of the victim's type, and the prosecutor placed great emphasis upon the shorts in his argument to the jury. However, an examination conducted by an expert obtained by the defense in connection with a post-trial habeas corpus attempt revealed that the "blood" stains

on the shorts were not blood but were red paint. The prosecution admitted knowledge that the stains were paint and conceded that a police report had been prepared on the paint stains.

The prosecution in Miller argued that everyone at the trial had known that the stains were paint and that it was obvious from viewing the shorts that they were stained with paint rather than blood. However, the defense expert had testified that even he had been fooled by the garment's appearance and that a layman would easily assume that the stains were blood. This Court had no difficulty in rejecting the prosecutor's argument and finding that the prosecution had deliberately introduced evidence known to it to be false. 386 U.S. at 6-7; 87 S.Ct. at 787-788.

The present case is clearly distinguishable from Miller. The foil wrapped gun was not evidence in this case but was merely the result or product of a demonstration conducted before the jury. Neither the gun nor the foil was evidence except in the most derivitive sense. Far from being a "vital component" in the prosecution's case, the gun wrapping demonstration and the foil produced by it were designed only to rebut a defense theory designed to weaken part of the Commonwealth's case.

While in Miller the prosecution's knowledge and wilful participation in the presentation of the false evidence was admitted, in the present case such knowledge and involvement were vigorously denied and no evidence was produced to show prosecution or police knowledge of or responsibility for any changed condition which may have occurred in the foil. In addition,

the argument advanced in Miller which was rejected in that situation, would seem appropriate here. In this case the demonstration occurred in the presence of the jury and the results were clearly visible to the jurors. In fact, the foil wrapped gun was placed on a counsel table in plain view of the jury for the remainder of the morning session. Whatever change in condition which may have occurred from the morning session until the rebuttal closing argument would have been obvious to the jury when the gun was again unwrapped and displayed. To suggest that three courtroom spectators would have noticed a change in the condition of the foil, but the twelve jurors who were far closer would not, cannot be accepted as a serious contention. It is clear that any change in the condition of the foil during the trial could not "in any reasonable likelihood have affected the judgment of the jury," thereby making any such change immaterial. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L. Ed. 2d 104 (1972).

As the record plainly shows, the Petitioner's trial counsel made no objection to the demonstration or to the use of the foil wrapper in the rebuttal closing. Obviously, if the defense counsel had observed any material change in the condition of the foil during the trial there would have been vigorous objections made. Thus, an independent appraisal of the evidence presented on the post-trial motion fails to meet the burden of showing that the Petitioner was deprived of due process of law under the Fourteenth Amendment to the United States Constitution.

III. The Petition for a Writ of Certiorari should be denied because the question presented in the Petition has never been properly presented to the courts of Virginia.

This Court will not entertain any Federal question raised by a petition for a writ of certiorari which has not previously been raised and presented to the state courts to which the certiorari is requested. *Beck v. Washington*, 369 U.S. 541, 549-554, 82 S.Ct. 955, 960-962, 8 L. Ed. 2d 98 (1962), reh. den. 370 U.S. 965, 82 S.Ct. 1575, 8 L. Ed. 2d 834 (1962); *Newsom v. Smyth*, 365 U.S. 604, 604-605, 81 S.Ct. 774, 5 L. Ed. 2d 803 (1961).

Rule 5:7 of the Rules of the Supreme Court of Virginia (1972) clearly provides, with few exceptions, that an objection which requires a ruling of the trial court must be made in the trial court with the grounds of the objection being stated "with reasonable certainty at the time of the ruling". An examination of the record reveals that no objection, other than a general objection made without specifying any particular grounds for the objection, was made to the trial court's ruling denying the motion for a new trial.

It is clear that the purpose of requiring that objections be specified with certainty at the time of the trial court's ruling is to allow the trial court the opportunity to reflect upon and correct any errors itself, obviating the necessity for an appeal. The wisdom of such a rule is cogently illustrated by this case where the issue being argued in this appellate proceeding is the

trial court's failure to rule upon a factual issue. If such an objection had been specified the trial court could have made a ruling on the factual issue or further buttressed its reasons for not ruling on the issue. However, in this case the trial court was never alerted to the issue here argued.

Rule 5:7 also requires that every error complained of be stated in the notice of appeal and assignments of error if it is to be considered by the Virginia Supreme Court and used as a basis for reversing the decision of the trial court. In this case none of the three assignments of error even suggest that error was being assigned to the trial court's failure to make a factual determination as to whether the foil produced by the demonstration had been materially altered during the trial. Thus the issue presented by this Petition has never been properly presented to the courts of Virginia.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the Petition for Writ of Certiorari filed by the Petitioner in this case fails to show any special and important reasons for the granting of a writ of certiorari and that, consequently, the Petition should be denied.

Respectfully submitted,
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APPENDIX

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF MARTINSVILLE

Harry William Brown, Appellant, VS. Commonwealth of Virginia, Appellee.	Notice of Appeal and Assignments of Error

TO: THE CLERK OF THE CIRCUIT COURT OF THE CITY OF MARTINSVILLE

Notice is hereby given that the Appellant, Harry William Brown, does hereby file with the Clerk of the Circuit Court of the City of Martinsville, Virginia, this his Notice of Appeal and Assignments of Error from two final judgment Orders entered against him on the 31st day of January, 1974.

The Appellant hereby assigns as error the following:

CASE A - No. 173-17, 315:

1. The Trial Court erred in failing to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence.

2. The Trial Court erred in failing to set aside the verdict of the jury on the grounds of after-discovered evidence which showed that material evidence had been altered and changed while it was in the possession of the Commonwealth of Virginia during the trial.

3. The Trial Court erred in failing to set aside the verdict of the jury on the grounds that evidence in the exclusive possession of the Commonwealth of Virginia was materially changed and altered during the trial. Such actions violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the Constitution of Virginia by denying the Defendant a fair and impartial trial.

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CERTIFICATE OF SERVICE

I, J. Randolph Smith, Jr., Assistant Commonwealth's Attorney, City of Martinsville, Virginia, counsel for respondent, do hereby certify that on or before April 1, 1975, I did personally serve three printed copies of the foregoing Brief in Opposition upon R. Reid Young, Jr., Esq., counsel of record for the petitioner, by delivering the said copies at his office at 60 West Church Street, Martinsville, Virginia, to the said counsel personally or to a clerk therein. All parties required to be served have been served.

J. RANDOLPH SMITH, JR.
Counsel for Respondent